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IN THE

# Supreme Court of the United States

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IRA C. RITTER AND THE KROGER CO.,
*Petitioners,*

v.

JERRY STANTON AND RUTH A. STANTON,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Court of Appeals of Indiana**

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## BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE*[1]

The American Insurance Association ("AIA") is the leading property and casualty insurance trade organization in the United States. It represents some 410 insurers that write in excess of $87 billion in premiums nationwide. AIA member companies offer all types of property and casualty insurance, including commercial liability insurance covering the type of liability for which damages were awarded in this case.

The issue in this case is whether the Seventh Amendment prohibits a state court from reviewing jury verdicts for excessiveness by reference to comparable verdicts in prior cases. This question is of vital importance to the membership of *amicus curiae*.

Jury verdicts awarding excessive non-economic damages are a matter of serious and growing concern to the insurance industry. Unlike punitive damages, many awards of non-pecuniary damages are covered by some type of liability insurance coverage such as commercial, automobile, homeowners, medical malpractice or professional liability insurance. Insurers thus ultimately bear a significant portion of the costs of compensation for non-pecuniary losses.

AIA members rely on meaningful judicial review to help rein in errant or excessive jury awards. However, the decision of the Indiana appellate court in this case has created significant uncertainty about the permissible scope of state

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[1] Counsel of record for both Petitioners and Respondents have consented to the filing of this brief in letters that have been lodged with the clerk. No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief.

judicial review over non-pecuniary damages. The Indiana court's decision exposes AIA members to virtually open-ended financial exposure in that state and generates doubt about the constitutionality of the comparability analysis throughout the country. At the very least, the Indiana court's ruling will lead to significant disparities between standards governing non-economic damages in Indiana and other states and inevitably result in rampant forum shopping. AIA therefore submits this brief in support of Petitioners.

## REASONS FOR GRANTING THE WRIT

This Court should grant review because the decision below presents an important issue of federalism - the extent to which the Seventh Amendment constrains state appellate review of jury awards for non-pecuniary loss. Although in recent years this Court has addressed the question of judicial review of punitive damage awards, it has not addressed this issue in the context of non-economic damages, which present much the same problem of arbitrary and excessive awards.

This case is emblematic of the growing problem with non-pecuniary damages. The jury returned a startling $64,000,000 verdict for non-pecuniary damages - more than 20 times the size of the already generous award for economic damages. Runaway verdicts such as this one are, in large part, the result of the lottery-like aspect of non-pecuniary damages. Plaintiffs can "roll the dice" and try their luck with juries, who, with no objective benchmark for assessing non-pecuniary harm, often award windfall amounts. This casino-like atmosphere is encouraged when there is no clear set of legal principles governing the excessiveness of these awards and when the defendant's liability is covered by insurance.

As the Court has emphasized in the context of punitive damages, the "wide discretion" wielded by juries "creates the potential" for excessive and biased verdicts and therefore

magnifies the need for both "meaningful and adequate" judicial review. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420, 432 (1994). Consistent with this principle, many state legislatures and state courts have adopted the comparability standard to ensure meaningful judicial review of non-pecuniary awards. The comparability standard requires the reviewing court to determine if the verdict falls so far outside the range of prior verdicts as to raise questions about the jury's impartiality. Both state and federal courts alike have regarded comparable verdicts as an extremely valuable benchmark for assessing the reasonableness of a non-pecuniary award.

The Indiana court held that the Seventh Amendment right to a jury trial barred state appellate courts from adopting the comparability standard. If allowed to stand, this clearly erroneous interpretation of the Seventh Amendment as applying to state court trials will deter states from adopting the comparability standard and create confusion about the application of that standard in the states that have adopted it. The Court should review the issue immediately not only because of the Indiana court's egregious failure to follow longstanding precedent of this Court, but because the Indiana ruling will interfere with the ability of the States to address the growing crisis caused by spiralling jury verdicts for non-pecuniary damages.

## I. There Is a Significant Civil Justice Problem of Arbitrary and Excessive Jury Awards for Nonpecuniary Losses

In tort and product liability suits, most states allow claimants to recover damages attributable to non-pecuniary harm. Non-pecuniary harm includes such things as pain and suffering, disfigurement, mental anguish and grief, loss of consortium, loss of society, injury to reputation, and loss of parental guidance and training. These damages are available

in addition to economic losses such as lost wages and costs of medical treatment.

Assessing non-pecuniary losses is inherently difficult because, by definition, this type of damage is not measured by economic loss. Rather, the injury is a subjective loss and cannot be measured by reference to objective factors such as the injured person's compensation or a medical provider's bill. "[M]easuring pain and suffering in dollars is inescapably subjective." *Gibbs v. United States*, 599 F.2d 36, 39 (2d Cir. 1979). Juries assessing non-pecuniary damages as one-time decisionmakers thus have no ready frame of reference for translating such injuries into a dollar amount. As a consequence, different juries assess widely divergent dollar amounts for similar injuries.

This Court has explained in the context of punitive damages that the "wide discretion" wielded by juries "creates the potential" for excessive and biased verdicts. *Honda*, 512 U.S. at 432. The same is true for non-pecuniary damages. Both courts and legal commentators alike have found that jury assessments of non-pecuniary losses are inherently arbitrary and susceptible to a variety of improper influences and biases. For example, the absence of objective guidelines also gives the jury latitude to express sympathy for the plaintiff by increasing the non-economic element of the damages award.

Studies by leading scholars in this field have found that there is an unacceptable degree of variation in jury awards for non-pecuniary damages. For example, Professor David W. Leebron attempted to find a correlation between the length of time the injured person suffered pain and the amount of the award. He found that "the temporal element of the pain and suffering has no statistically significant effect for durations from half a minute up to one week." David W.

Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 259 (1989). This study concluded that "[t]ort awards . . . vary significantly and . . . neither the specific facts of the case nor differing theoretical views of the functions of the awards can explain such variation." *Id.*[2]

State and federal courts have made similar observations. "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement." *Beagle v. Vasold,* 417 P.2d 673, 675 (Cal. 1966) (internal quotations and citation omitted).[3] The size of non-economic damages vary dramatically from jurisdiction to jurisdiction. As one state court observed:

> It is curious that awards for pain and suffering on one side of the East River are uniformly two and three times higher than on the other. Is it that the composition of the two respective communities are so different? I think not . . . .

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[2] *See also* Oscar G. Chase, *Helping Jurors to Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 768 (1995) ("Both anecdotal and empirical evidence indicates that the disparity between awards for pain and suffering among apparently similar cases defies rational explanation."); *accord Final Moments: Damages For Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. at 324-25.

[3] *See also Marcotte v. Timberlane/Hampstead Sch. Dist.*, 733 A.2d 394, 408 (N.H. 1999) (same); *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1009 (2d Cir. 1995) ("compensation for suffering can be accomplished only in a symbolic and arbitrary fashion"), *vacated and remanded for further consideration on other grounds,* 518 U.S. 1031 (1996).

*Baumgarten v. Slavin*, No. 9018/84, slip op. at 3 (Sup. Ct. Nas. County May 6, 1997), *quoted in* Cerisse Anderson, *$5 Million Pain and Suffering Award Upheld*, 217 New York L.J. 91:1 (1997).

Certain groups are particularly vulnerable to arbitrary and improper assessments by juries. For example, "[j]uries may be especially inclined to make substantial awards when they believe that the defendant's liability is covered by insurance." *Consorti*, 72 F.3d at 1009 n.2. Empirical studies likewise find that the jury is more likely to render a large verdict where the defendant is an insurance company, a corporation or governmental entity. Ostrom Ostrom, *et al., What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 Law & Pol'y 77, 84-85 (1992).

Excessive verdicts do not further the objectives of tort damages, see *Raishevich v. Foster*, 9 F. Supp.2d 415, 421 (S.D.N.Y. 1998) ("object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket"), and the ramifications for the civil justice system are serious. Excessive verdicts harm not only individual defendants, but they "destroy the fairness of the judicial system, as well as the predictability of litigation," *Consorti,* 72 F.3d at 1009, in the following respects.

*First*, the prospect that recovery may turn on the particular jury fuels the incentive to litigate and only delays delivery of compensation to a meritorious claimant. The prospect of a windfall award interferes greatly with the parties' ability to assess the case and potentially settle it for reasonable sum. Litigants are far more willing to take their chances at the courthouse, thus adding unnecessary transaction costs to the tort system and consuming scarce judicial resources. *See* Oscar G. Chase, *Helping Jurors*

*Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995).

*Second*, a disparity in verdicts "undermines the legal system's claim that like cases will be treated alike." *See id.* at 769. While this difference in treatment is bad enough when based upon such factors as the ability of counsel or the locale where the case is tried, frequently the factors leading to widely disparate awards include the race, ethnicity, or wealth of the parties--factors that we as a society have uniformly deemed to be unacceptable considerations upon which to base legal distinctions.

*Third*, the variability in verdicts naturally leads to forum-shopping by plaintiffs seeking to play on the known propensities of juries in a particular locale.

*Fourth*, excessive verdicts have a detrimental effect on insurance availability and affordability. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L. Rev. 1521 (1987); George L. Priest, *The Liability Crisis,* Yale Law Report (Fall 1987). Professor Priest views the evolution of expansive modern tort law and high verdicts as "chiefly motivated by the concern of our courts to provide insurance to victims who have suffered personal injury." 96 Yale L.J. at 1525. But "exactly the opposite effect" has occurred. There has been a "reduction in total insurance coverage available to the society, rather than to an increase." *Id.*

*Finally*, in addition to all of these very real ramifications, "[p]erceptions that the law routinely delivers lottery-like outcomes and unfair windfalls for plaintiffs and their lawyers threaten public confidence in and support for the civil justice system." David Baldus, *et al.*, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the*

*Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 Iowa L. Rev. 1109, 1118 (1995).

## II. The States Increasingly Have Adopted Excessiveness Review Standards, Including the Comparability Standard, to Ensure Consistency and Stability in Jury Verdicts

This Court previously has recognized the crucial role played by judicial review in controlling excessive punitive damage awards. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court found that unlimited jury or judicial discretion in the fixing of punitive damages "may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18. The Court held that appellate review, which included comparative review with other cases, provided a necessary and meaningful constraint on jury discretion. *See also Honda*, 512 U.S. at 420.

The constitutional requirement of meaningful judicial review of a damage verdict is not limited to punitive damages. As Justice Scalia explained, "[p]rocedural due process . . . requires, I am certain . . . judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 471 (1993) (plurality opinion) (Scalia, J., concurring in the judgment). Because determinations of non-pecuniary losses are inherently imprecise, meaningful judicial review is needed in order to preserve some consistency in jury awards that are susceptible to bias.

Historically, state courts had the authority to review the excessiveness of a jury verdict, but such review traditionally was limited to the inquiry whether the award "shocks the conscience of the Court." *See, e.g., Juditta v. Bethlehem*

*Steel Corp.*, 428 N.Y.S.2d 535 (N.Y. App. Div. 1980). The state courts have applied this review power sparingly and, thus, judicial review did not effectively control spiralling jury verdicts. *Cf. Consorti*, 72 F.3d at 1010 ("When courts fail to exercise the responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one.").

In response, a growing number of states have adopted the comparability standard to aid in reviewing for excessiveness. Under this standard, the courts compare the verdict to reported decisions upholding jury awards in comparable circumstances. This kind of review can be conducted by both the trial court (at the post-trial motion stage) and the appellate court (on a review of the lower court's rulings). A review based on comparables has the benefit of injecting an objective measure of fairness and reasonableness into the process without intruding on the jury's function:

> Juries have no way to compare an award in a given case with other awards in similar cases, but judges do. Without some kind of review, the system will produce radically inconsistent awards for the same kinds of injuries and will be destined to take on more of the aspects of a lottery than it already has.

William Powers, Jr. & Jack Ratliffe, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 Tex. L. Rev. 515, 567 (1991).

A "peer review" of the decision of one jury by comparing it to the decisions of other juries in similar cases provides assurance that the jury's particular view will comport with society's collective judgment as to what consequences should

flow from similar facts. The comparability analysis thus insures that jury verdicts are truly representative of community values. As one court approving the comparative analysis explained,

> A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, decisions on the subject by appellate courts, furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded.

*Senko v. Fonda*, 384 N.Y.S.2d 849, 851-52 (N.Y. App. Div. 1976) (citation omitted).

Comparability analysis does not impose a rigid, mathematical cap on non-pecuniary damages but, rather, is a balanced "rule of reason" approach of the type that common law courts traditionally have fashioned. A jury verdict that is well in excess of the range of previously upheld awards is not automatically struck down but creates an inference of prejudice or partiality. This requires the prevailing party to justify an award in excess of the approved range, such as by showing special factual circumstances.

Aside from being a vital check against excessive jury awards, there are additional benefits to the comparability standard. Review under the comparability standard provides a needed measure of consistency and stability, and ensures greater fairness to similarly situated defendants. It also provides guidance to the parties in assessing their cases for settlement purposes. One commentator, in discussing the comparability standard, noted that "[e]ach side must come

away from settlement negotiations thinking the result, though not ideal, is essentially fair . . . Appellate decisions play a major role in helping to shape those [parties'] expectations." Thomas Newman, N.Y. Appellate Practice § 4.10 (1994). Finally, comparability review holds down insurance costs by reducing the number of excessive verdicts.

The usefulness of comparative analysis is demonstrated by the fact that numerous state and federal courts have adopted this standard for review of jury verdicts. For example, many of the nation's larger states such as New York, Florida and Michigan, as well as numerous smaller states such as Connecticut and Kentucky, utilize the comparability standard.[4] As for the remaining states, legal

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[4] *See, e.g., Palenkas v. Beaumont Hosp.*, 443 N.W.2d 354, 358 (Mich. 1989) (analogous cases "may provide some sense of a reasonable range of awards"); *Buffalo Athletic Club v. New York State Div. of Human Rights*, 672 N.Y.S.2d 210, 211 (N.Y. App. Div. 1998); *Cade v. Walker*, 771 So. 2d 403, 408 (Miss. Ct. App. 2000) ("We . . . review a claim of excessiveness . . . by comparing the awards at issue with rulings in other factually similar cases decided under controlling law."); *Fowler v. Park Corp.*, 673 S.W.2d 749, 758 n.15 (Mo. 1984); *Landreth v. Reed*, 570 S.W.2d 486, 492 (Tex. Civ. App. 1978) (explicitly referencing to analogous awards in determining excessiveness of pain and suffering award); *Richlin v. Gooding Amusement Co.*, 170 N.E.2d 505, 513-14 (Ohio Ct. App. 1960) (permitting comparisons in a negligence case); *Sprangler v. Helm's New York-Pittsburgh Motor Express*, 153 A.2d 490, 494 (Pa. 1959) ("a view of other cases, of course, is always helpful"); *Washington County Kennel Club, Inc. v. Edge*, 216 So. 2d 512, 516 (Fla. Dist. Ct. App. 1968) (citing *Pendarvis v. Pfeifer*, 182 So. 307 (Fla. 1938)); *Gorczyca v. New York, New Haven & Hartford R.R.*, 109 A.2d 589, 592 (Conn. 1954) (comparison of awards in other cases offers "some guidance in determining the range of those necessarily flexible limits of fair and reasonable compensation by which the amount of the verdict

(Continued ...)

commentators strongly urge them to join the growing trend of states discarding the "shocks the conscience" standard in favor of the "comparability" standard.[5] In addition, many federal courts employ comparability review of jury verdicts.[6]

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must be tested"); *Yankey v. McHatton*, 444 S.W.2d 745, 747 (Ky. 1969) ("Our cases have consistently recognized that determination of the propriety of personal injury verdicts depends upon the facts of the particular case and what compensation has been upheld for similar injuries . . . ."); *Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83, 98 (Mo. 1985) (excessiveness depends, *inter alia*, on "comparison of the compensation awarded and permitted in cases of comparable injuries"); *Complete Auto Transit, Inc. v. Reese*, 425 P.2d 465, 469 (Okla. 1967) ("[I]n considering the question of excessiveness of a verdict recourse might be had to the amounts of verdicts in similar cases."); *Lucht v. Youngblood*, 221 S.E.2d 854, 858 (S.C. 1976) ("The comparison approach is helpful and sometimes forceful"); *Martin v. Southern Ry.*, 463 S.W.2d 690, 692 (Tenn. 1971) ("One of the methods used in determining the issue of excessive awards is to compare the amount awarded in other cases having similar facts").

[5] *See, e.g.*, Brad Snyder, *Protecting the Media From Excessive Damages: The Nineteenth-Century Origins of Remittitur and Its Modern Application in Food Lion*, 24 Vt. L. Rev. 299, 343 (2000); Baldus, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 Iowa L. Rev. at 1127.

[6] *See, e.g., Reimer v. Illinois Dep't of Transp.*, 148 F.3d 800, 808 (7th Cir. 1998) (stating that review of a compensatory damages award depends in part on "'whether the award is roughly comparable to awards made in similar cases'") (citations omitted); *Mathie v. Fries*, 121 F.3d 808, 813-14 (2d Cir. 1997) ("[T]he determination of whether a damages award exceeds a reasonable range 'should not be made in a vacuum,' but should include

(Continued ...)

## III. The Indiana Court's Ruling on the Seventh Amendment Improperly Constrains the States' Freedom to Address the Problem of Excessive Verdicts

The state courts adopting comparability analysis do not regard this standard for appellate review as trespassing on the jury's functions. Jury discretion is not unfettered. "Juries cannot simply pick a number and put it in [a] blank. They must find an amount that . . . 'would fairly and reasonably compensate' for the loss." *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) (citation omitted).

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consideration of the amounts awarded in other, comparable cases.") (citation omitted); *Hetzel v. County of Prince William*, 89 F.3d 169, 172-73 (4th Cir. 1996) (reviewing awards for intangible injuries in other cases and concluding jury's award for emotional distress was "outrageous" in comparison), *rev'd on other grounds*, 523 U.S. 208 (1998); *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990) ("Reference to other awards in similar cases is proper."); *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990) ("similar [verdicts] provide a helpful framework for general comparison"); *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989) ("[W]hile comparisons with other cases are not dispositive, . . . [o]ur review of the record, informed by a review of awards granted in other comparable cases, indicates that the award [was excessive]."); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 721 (8th Cir. 1976) (stating that comparative review of state court awards in a federal diversity case assures that "damage awards do not exceed those which could be sustained were the case before the Supreme Court of the state whose substantive law gives rise to the claim"); *Dunn v. Consol. Rail Corp.*, 890 F. Supp. 1262, 1286-91 (M.D. La. 1995) (comparing jury's award in diversity case to those rendered in wrongful death actions in state courts).

Similarly, federal courts – which, unlike state courts, are subject to the Seventh Amendment – have adopted comparability analysis and thus found no constitutional infringement on the powers of the jury. *Cf. Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 n.9 (1996) (noting that "courts of appeals have held that district court application of state statutory caps in diversity cases, postverdict, does not violate the Seventh Amendment."). These federal courts reason that review to determine whether a damage award materially deviates from similar verdicts requires the application of legal standards to fact determinations, and therefore presents a mixed question of fact and law.[7] *See generally Thompson v. Keohane*, 516 U.S. 99 (1995) (discussing Court's definition of mixed questions). The Re-examination Clause plainly permits federal courts to engage in this traditional form of appellate review. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964) (The Seventh Amendment's "ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts.").

The contrary decision below violates fundamental principles of federalism and state sovereignty by applying – and, indeed, wrongly applying – a constitutional provision

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[7] *See Dagnello v. Long Island R.R. Company*, 289 F.2d 797, 806 (2d Cir. 1961) ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."), *quoted with approval in Gasperini*, 518 U.S. at 435-36; *see also Consorti v. Armstrong World Indus.*, 103 F.3d 2, 4 (2d Cir. 1996) (*per curiam*); *Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984).

applicable only to the Federal government to constrain the power of state trial and appellate courts. Unless this decision is overturned, it may create doubt in other states about the constitutionality of the comparability analysis they have adopted. The decision below may also deter other states from adopting this standard, as some recently have done.[8] More generally, the Indiana court's decision will inhibit the states' flexibility in fashioning legislative or judicial reforms addressing the excessive verdict problem.

Because plaintiffs "fear appellate reduction of damages," *Honda*, 512 U.S. at 433 n.11, the Indiana court's ruling will also foster forum-shopping in the large percentage of cases where multiple venues are available. *See Norfolk & W. Ry. v. Ayers*, 122 S. Ct. 1434 (2002) (granting certiorari in a case where the petitioner railroad complained about increased forum-shopping in West Virginia for federal tort claims). A party's right to the constitutional protection of meaningful judicial review over excessive awards should not depend upon the fortuity of the state in which the claim is brought.

Review by this Court is therefore urgently needed to restore certainty to this important area of the law. Just as the Court recognized that punitive damages have "run wild" in the American legal system, jeopardizing fundamental constitutional rights, *see Haslip*, 499 U.S. at 18, the same is true for non-pecuniary damages. At a time when the states are actively addressing this problem, only this Court can end the threat to state reform generated by the Indiana state court's plainly erroneous ruling on the Seventh Amendment.

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[8] *See, e.g., Cade v. Walker*, 771 So. 2d at 408 (adopting the comparability standard).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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